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IN THE

Supreme Court of the United States

October Term, 1963
No. 625

BRASWELL MOTOR FREIGHT LINES INC., DENVER-CHICAGO TRUCKING CO., INC., HOPPER TRUCK LINES, ILLINOIS-CALIFORNIA EXPRESS, INC., UNIVERSAL CARLOADING & DISTRIBUTING CO., INC., REPUBLIC CARLOADING & DISTRIBUTING CO., INC., NATIONAL CARLOADING CORPORATION, WESTERN CARLOADING CO., and ACME FAST FREIGHT, INC., corporations,

Petitioners,

vs.

PENSICK & GORDON, INC., a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CATLIN & CATLIN,
FRANK D. CATLIN,
GEORGE L. CATLIN,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Petitioners,
Universal Carloading & Distributing Co., Inc.,
Republic Carloading & Distributing Co., Inc.,
National Carloading Corporation,
Western Carloading Company,
Acme Fast Freight, Inc.

and

RUSSELL & SCHUREMAN,
THEODORE W. RUSSELL,
1010 Wilshire Boulevard,
Los Angeles, California, 90017,
Attorneys for Petitioners,
Braswell Motor Freight Lines, Inc.,
Denver-Chicago Trucking Co., Inc.,
Hopper Truck Lines,
Illinois-California Express, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX.

	Page
Opinion of the Supreme Court and of the courts below	2
Jurisdiction	3
Questions presented	3
Statutes involved	4
Statement of the case	5
Argument for allowance of the writ	8
A. The holding of the Court of Appeals that the amended complaint states a cause of action which survives the enactment of the Motor Carrier Act is in conflict with applicable decisions of this court	8
1. The holding of the Court of Appeals that the amended complaint states a common law cause of action is in conflict with the decisions of this court in Hewitt-Robins and T.I.M.E., infra	8
2. The holding that the District Court has power to modify and adapt a common law action to conform to the Motor Carrier Act is in conflict with the decisions of this court in T.I.M.E. Inc. v. United States (359 U. S. 464) and Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc. (371 U. S. 84)	14
B. The holding of the Court of Appeals that the District Court can refer or require reference to the Interstate Commerce Commission for such aid as may be necessary or useful to the court's ultimate decision is in conflict with the decisions of this court and results	

Page

in sanction of departure from the accepted and usual course of judicial proceedings calling for the exercise of the Supreme Court's power of supervision 15

C. The holding of the Court of Appeals that the jurisdiction of the District Court has not been pre-empted by that of the National Labor Relations Board is in conflict with applicable decisions of this court 17

D. Assuming jurisdiction of the District Court over the action, the holding that said court can refer or require reference for aid to the NLRB presents an important question of federal law which has not been, but should be, settled by this court 24

E. The issues presented are such that review is required before further proceedings in the District Court 26

Conclusion 28

Index to Appendices

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit 7

Appendix C. Opinion of the United States Court of Appeals for the Ninth Circuit 8

Appendix D. Interstate Commerce Act 13

TABLE OF AUTHORITIES CITED

Cases	Page
Amalgamated Ass'n etc. v. Wisconsin Employment Relations Board, 340 U. S. 383, 95 L. Ed. 364,	
Armour & Co. v. Alton R. Co., 312 U. S. 195, 85 L. ed. 771, 61 S. Ct. 498	9, 10
Association of Journeymen v. Borden, 373 U. S. 690, 10 L. Ed. 2d 638, ... S. Ct.	22, 25
Baltimore & Ohio R. Co. v. United States, 215 U. S. 481, 30 S. Ct. 164, 54 L. ed. 292	10
Bell Potato Chip Co. v. Aberdeen Truck Line, 43 M. C. C. 337	17
Bogle v. Jakes Foundry Co., 362 U. S. 401, 4 L. Ed. 2d 864, 80 S. Ct. 812 (Reversing 329 S. W. 2d 364)	19, 22
Burlington Truck Lines, Inc. v. United States, 371 U. S. 156	11
Federal Maritime Board v. Isbrandsen Co., 356 U. S. 481	15, 16
Garner v. Teamsters C & H Local Union No. 776, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161	18, 19, 25
General Drivers, etc. v. American Tobacco Co., 348 U. S. 978, 99 L. Ed. 762, 75 S. Ct. 659 (Reversing 264 S. W. 2d 250)	19, 20, 21
Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 371 U. S. 84, 9 L. ed 2d 142, 83 S. Ct. 157	7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
KVOS v. Associated Press, 299 U. S. 269, 81 L. ed. 183, 57 S. Ct. 197	26
Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209, 67 S. Ct. 1009	26

Page

Local Union No. 25 v. New York, N. H. & H. Ry. Co., 350 U. S. 155, 100 L. Ed. 166, 76 S. Ct. 227 18

Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. ed. 517 9

McCrary et al. v. Aladdin Radio Industries, Inc., 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (Remanding 298 S. W. 2d 770) 19, 21

Meier & Pohlman Furniture Co. v. Giboons, 233 F. 2d 296 11

Merchandise Warehouse Co. v. A.B.B. Freight Forwarding Corp., 165 F. Supp. 67 12

Midland Valley R. Co. v. Barkely, 276 U. S. 482, 72 L. ed. 664, 48 S. Ct. 342 9

St. Louis B. & Mexico R. Co. v. Brownsville Navigation Dist., 304 U. S. 295, 82 L. ed. 1351, 58 S. Ct. 868 10

San Diego Building Trades Council v. Garmon. 359 U. S. 236, 3 L. Ed. 775, 79 S. Ct. 773 ..... 19, 22, 23, 25, 26

T.I.M.E. Inc. v. United States, 359 U. S. 464, 3 L. ed. 2d 952, 79 S. Ct. 904 ..... 8, 9, 10, 11 ..... 13, 14, 15, 16, 17

Teamsters v. Kerrigan Iron Works, 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1055 ..... 19, 21, 22

Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 9

United States v. Western Pacific R. Co., 352 U. S. 59 ..... 15, 16

Weber v. Anheuser Busch, 348 U. S. 468, 99 L. Ed. 2d 952, 79 S. Ct. 904 ..... 19, 20, 21, 22, 25

Statutes Page

Interstate Commerce Act, Part II, Secs. 201-227 4
Interstate Commerce Act, Part II, Sec. 216(b) 4
Interstate Commerce Act, Part II, Sec. 216(d) 4
Interstate Commerce Act, Part IV, Secs. 401-422 4
Interstate Commerce Act, Part IV, Sec. 404(a) 4
Interstate Commerce Act, Part IV, Sec. 404(b) 5
Labor Management Relations Act, Sec. 7 .....
.....5, 23, 24, 25
Labor Management Relations Act, Sec. 8 .....
.....5, 23, 24, 25
Labor Management Relations Act, Sec. 10 24
Labor Management Relations Act of 1947, Secs. 141-187 .....4, 19
United States Code, Title 28, Sec. 1254(1) 3
United States Code, Title 29, Sec. 160 24
United States Code, Title 29, Sec. 160(a) 24
United States Code, Title 29, Secs. 160(b)-(j) 25
United States Code, Title 49, Sec. 9 16
United States Code, Title 49, Sec. 15(8) 12
United States Code, Title 49, Sec. 204(7)(c) 12
United States Code, Title 49, Sec. 216(b)(d) 12
United States Code, Title 49, Sec. 216(e) 12
United States Code, Title 49, Sec. 216(j) 4, 14
United States Code, Title 49, Sec. 222(b) 12
United States Code Annotated, Title 28, Sec. 1332 .. 5
United States Code Annotated, Title 28, Sec. 1337 .. 5
United States Code Annotated, Title 29, Sec. 141 4
United States Code Annotated, Title 29, Sec. 141-187 4

Page

United States Code Annotated, Title 29, Sec. 157 5

United States Code Annotated, Title 29, Sec. 158 5

United States Code Annotated, Title 49, Sec. 316-(b) 4

United States Code Annotated, Title 49, Sec. 316-(d) 4

United States Code Annotated, Title 49, Sec. 316-(j) 4

United States Code Annotated, Title 49, Secs. 401-327 4

United States Code Annotated, Title 49, Secs. 1001-1022 4

United States Code Annotated, Title 49, Sec. 1004-(a)(b) 5

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Petitioners,

vs.

PENSICK & GORDON, INC., a California corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Braswell Motor Freight Lines, Inc., Denver-Chicago Trucking Co., Inc., Hopper Truck Lines, Illinois-California Express, Inc. (hereafter referred to collectively as the "Motor Carrier Petitioners") and Universal Carloading & Distributing Co., Inc., Republic Carloading & Distributing Co., Inc., National Carloading Corporation, Western Carloading Co., and Acme Freight, Inc. (hereafter referred to collectively as the "Forwarder Petitioners"), all corporations, pray that a writ of cer-

tiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit filed and entered on September 18, 1963 in *Pensick & Gordon, Inc., Appellants vs. California Motor Express, et al., Appellees,* No. 17380.

Opinion of the Supreme Court and of the Courts Below.

There is no written opinion of the United States District Court in support of the order of dismissal which is the subject of appeal in No. 17380. The Court of Appeals consolidated for consideration and decision No. 17380 and a prior appeal arising out of the same action designated as No. 17235. An opinion of the Court of Appeals for the Ninth Circuit filed and entered April 13, 1962, affirming the District Court in both cases, is reported in 302 F. 2d 391 (1962). Copy of said opinion is printed and attached hereto as Appendix A.

The opinion of this Court filed December 3, 1962, remanding the cases to the Court of Appeals for the Ninth Circuit is reported at 371 U. S. 184, 9 L. Ed. 2d 227, 83 S. Ct. 265 (1962). Copy of said opinion is printed and attached hereto as Appendix B.

The opinion of the Court of Appeals in Case No. 17235 and 17380 after remand, which is the immediate subject of this petition, is not as yet reported. Copy of said opinion of the Court of Appeals after remand filed September 18, 1963, is printed and attached hereto as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals after remand by this Court was dated and entered, September 18, 1963. No rehearing was sought or granted. No order has been sought or granted for extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

The questions here presented are these:

1. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of common carriers by motor vehicle in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part II?

2. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of freight forwarders in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part IV?

3. Assuming jurisdiction of the District Court over the action, may the District Court seek and the Interstate Commerce Commission give an advisory opinion as to whether the carrier's conduct in failing to provide pickup and delivery service across picket lines con-

stitutes an unjust and unreasonable discrimination in service?

4. Is jurisdiction of the District Court in the particular controversy pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act, 29 U. S. C. A., §§141 *et. seq.*?

5. Assuming jurisdiction of the United States District Court is not so pre-empted, may the District Court seek and the National Labor Relations Board give an advisory opinion as to whether any activity of any person pertinent to the determination of the action is protected or prohibited by the National Labor Relations Act, as amended?

Statutes Involved.

The petition presents questions of the Congressional intent in the enactment of Interstate Commerce Act, Part II §§201-227 (49 U. S. C. A. §§301-327), Interstate Commerce Act, Part IV §§401-422 (49 U. S. C. A. §§1001-1022) and Labor Management Relations Act, §§141-187 (29 U. S. C. A. §§141-187). Therefore, in some measure, all of each of the above-cited provisions has pertinence. For convenience of reference, these statutes will be referred to in subsequent parts of the petition as the "Motor Carrier Act," the "Freight Forwarder Act" and the "Labor Relations Act," respectively. The provisions of these statutes most directly involved are Interstate Commerce Act, Part II, §§216 (b) 216(d) and 216(j), (49 U. S. C. A. §§316(b), (d) and (j)), Interstate Commerce Act, Part IV §§404

(a), 404(b), (49 U. S. C. A. §§1004(a)(b) and Labor Management Relations Act, §§7 and 8, (29 U. S. C. A. §§157, 158). Said statutory provisions last mentioned are reproduced in Appendix D.

Statement of the Case.

The action is one by a shipper for damages against common carriers predicated upon a claim that the failure of such carriers to provide service in interstate commerce to and from shipper's place of business constituted unjust and unreasonable discrimination in service. The action as to the Petitioners is brought on the first amended complaint. Plaintiff asserts jurisdiction in the United States District Court under 28 U. S. C. A. §1332 and 28 U. S. C. A. §1337. The ultimate issue on review is whether such jurisdiction exists under either of said statutory provisions.

Plaintiff, a wholesale distributor of toys, sells its merchandise to retailers throughout Western United States. Plaintiff regularly and customarily calls upon common carriers to make pick-up and delivery of property at plaintiff's location moving in interstate commerce.

The Motor Carrier Petitioners conduct operations as common carriers of property by motor vehicle in interstate commerce pursuant to certificates of public convenience and necessity issued to them under the Motor Carrier Act. Forwarder Petitioners conduct operations as freight forwarders in interstate commerce under permits issued to them pursuant to the Freight Fowarder Act.

For seven days in October, 1960 there was a strike of plaintiff's employees during which the Teamsters Union maintained a picket line at plaintiff's place of business. Driver employees of these Petitioners (and other common carriers), members of the Teamsters, declined to pass from public streets through the picket line to accomplish pick-up or delivery of shipments at the loading platform on plaintiff's premises. All other aspects of carrier service were performed as requested.

Plaintiff's action is predicated upon the claim that the failure of Petitioners to accomplish pickup or delivery across picket lines during the strike period constitutes unjust and unreasonable discrimination in service giving rise to an action for damages both under the Interstate Commerce Act and at common law. Diversity of citizenship between plaintiff and Petitioners was shown.

The action was dismissed by the District Court after motion of the Motor Carrier Petitioners that the District Court was without jurisdiction both under the Motor Carrier Act and the Labor Relations Act. Plaintiff appealed to the Court of Appeals for the Ninth Circuit. The case was consolidated for consideration and decision with a prior appeal in the same action involving defendants named in the original complaint.

In it's first opinion the Court of Appeals held the Motor Carrier Act did not create a statutory cause of action cognizable in the federal courts and that survival of a common law action would be inconsistent with that Act's statutory purpose. The effect upon jurisdiction of the Labor Relations Act was not decided.

After grant of writ of certiorari, this Court, in a *per curiam* opinion, remanded the case to the Court of

Appeals for further consideration in light of the decision in *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U. S. 84, 9 L. ed. 2d 142, 83 S. Ct. 157 (1962).

In its opinion on remand, review of which is here sought, the Court of Appeals held: (1) that the complaint states a common law action which survives passage of the Motor Carrier Act; (2) that jurisdiction of the District Court is not pre-empted by that of the National Labor Relations Board under the Labor Relation Act; (3) that the District Court can determine to what extent, if any, the common law right has been affected or qualified by the Motor Carrier Act or the Labor Relations Act; (4) that the District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to the Court's ultimate decision.

The Court of Appeals' holding in its first opinion that the Motor Carrier Act created no statutory cause of action cognizable in the federal courts was affirmed.

ARGUMENT FOR ALLOWANCE OF THE WRIT.

A. The Holding of the Court of Appeals That the Amended Complaint States a Cause of Action Which Survives the Enactment of the Motor Carrier Act Is in Conflict With Applicable Decisions of This Court.

1. The Holding of the Court of Appeals That the Amended Complaint States a Common Law Cause of Action Is in Conflict With the Decisions of This Court in Hewitt-Robins and T.I.M.E., Infra.

The issue of survival of judicial actions after the enactment of the Motor Carrier Act has now been before this Court in *T.I.M.E. Inc. v. United States*, 359 U. S. 464, 3 L. ed. 2d 952, 79 S. Ct. 904 (1959); *Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.*, 371 U. S. 84, 9 L. ed. 2d 142, 83 S. Ct. 157 (1962) and on the initial appeal in the present case. In *T.I.M.E.* the question presented was whether a shipper of goods could challenge in post-shipment litigation the reasonableness of charges of a motor carrier made in accordance with the tariff governing the shipment. (359 U. S. 464, 465.) In *Hewitt-Robins* the question was the power of the court to hear a controversy as to whether a motor carrier violated its duty to a shipper in selecting between authorized routes that route which produced the higher rate, both rates being admittedly reasonable. (371 U. S. 84.) In *Hewitt-Robins* the action was found consistent with the statutory purpose. In *T.I.M.E.* a *contra* result was reached. The cases were considered by the Court to be distinguishable on their facts.

In its initial decision the Court of Appeals held the action here involved to be inconsistent with the statutory purposes of the Motor Carrier Act on authority of *T.I.M.E.* On remand the Court of Appeals decides that jurisdiction does exist in light of *Hewitt-Robins.* However, the Court of Appeals has failed to reveal what factors in the case it considered in arriving at its determination that *Hewitt-Robins* should be accepted as the controlling precedent.

The present case bears some similarity to both *Hewitt-Robins* and *T.I.M.E.* There are, however, elements here present which bear on the question of consistency of the common law action with the statutory scheme which differs from the elements present in either *T.I.M.E.* or *Hewitt-Robins.*

In *T.I.M.E.* it was decided that since this Court had held a common law action for the recovery of unreasonable charges did not survive the enactment of Part I, Interstate Commerce Act (*Texas & P.R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426) and Congress had accepted such interpretation, it must be held a similar result should follow under the Motor Carrier Act. In its interpretation of Part I this Court has held consistently that under the statutory scheme the courts have no jurisdiction to decide in the first instance whether challenged practices of carriers are unreasonable or unjustly discriminatory.

Armour & Co. v. Alton R. Co., 312 U. S. 195, 85 L. ed. 771, 61 S. Ct. 498 (1941);

Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. ed. 517 (1916);

Midland Valley R. Co. v. Barkely, 276 U. S. 482, 72 L. ed. 664, 48 S. Ct. 342 (1928);

St. Louis B. & Mexico R. Co. v. Brownsville Navigation Dist., 304 U. S. 295, 82 L. ed. 1351, 58 S. Ct. 868 (1938);

Baltimore & Ohio R. Co. v. United States, 215 U. S. 481, 30 S. Ct. 164, 54 L. ed. 292 (1910).

The foregoing cases are comparable with that here presented in the same way that *Abilene Cotton Oil* is comparable with the facts in *T.I.M.E.* Therefore, the first question left unanswered by the Court of Appeals is: What rational basis can there be for the court to hold that under the Motor Carrier Act a common law action predicated on a claim of past unreasonableness as to service survives and that one based on past unreasonableness of charges does not when both such classes of action have been held by this Court to be inconsistent with the statutory purposes of Part I of the Interstate Commerce Act?

In its first opinion the Court of Appeals stated expressly that only the Interstate Commerce Commission can decide in the first instance whether any alleged act of disservice of carriers was unreasonable or unjustly discriminatory (Appendix A, p. 5). There is nothing in this Court's decision in *Hewitt-Robins* or in the decision of the Court of Appeals on remand requiring modification of this conclusion. It is a conclusion supported by *Armour & Co. v. Alton R. Co., supra,* and the other cases there cited. Noting that Congress had intentionally omitted from the Motor Carrier Act a private action for damages based on past unreasonable conduct of carriers, this Court in *T.I.M.E.* declared it would be anomolous to hold that Congress intended that

the sole effect of the omission of provisions for such direct actions for damages would be to require the shipper to bring two lawsuits instead of one. The second question presented, therefore, is: Why is the reasoning of *T.I.M.E.* not applied here since the fundamental tenets, *i.e.*, lack of right of direct action and necessity for the Commission to decide reasonableness, are both present?

In *Hewitt-Robins* the considerations cited in suppo: of the conclusion that survival of the action would not be inconsistent with the statutory purposes were: (1) that the claim involved did not jeopardize the stability of tariffs or of certificated routes or hamper efficient administration of the Act; (2) that allowance of the action would deter other violations of similar kind; (3) that the absence of judicial remedy placed the shipper at the complete mercy of the carrier, contrary to the purposes of the Act; (4) that statutory procedures for relief in advance of actual injury were not available. The opinion of the Court of Appeals gives no indication as to what extent, if at all, these considerations were applied by the Court in arriving at its conclusions that the survival of the cause of action here involved will be consistent with the purposes of the Motor Carrier Act.

As this Court has recognized, unjustified failure of service in a strike situation can place certificated routes in jeopardy. (See: *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156.) Courts can arrive at different conclusions as to what constitutes reasonable carrier conduct in picket line situations which are factually essentially the same. (Compare: *Meier & Pohlman Furniture Co. v. Giboons*, 233 F. 2d 296 and *Mer-*

chandise Warehouse Co. v. A.B.B. Freight Forwarding Corp., 165 F. Supp. 67.) The necessary result is a difference in treatment of shippers similarly situated which it is the aim of the statute to minimize. (49 U. S. C. §216(b)(d).)

In *Hewitt-Robins* the controversy necessarily involved only the shipper and carrier directly parties to the litigation. In the present case a shipper in a special circumstance which the carrier did not create asserts a right to service identical with that provided shippers not faced with the special circumstance. Necessarily involved, therefore, is the relationship between the carrier and all shippers.

In *Hewitt-Robins* the issue arose over the shipper's right to choice of routing. This right had not been guaranteed by specific statutory provision under the Motor Carrier Act as it had under Part I. (49 U. S. C. §15(8).) Therefore, absent a common law action no remedy existed. In the present case specific statutory remedies are provided in the Motor Carrier Act. (49 U. S. C. §§204(7)(c), 216(e), 222(b).) Significantly, such rights include a right to injunctive processes of the federal courts to prevent unjust discriminations in service upon request of the Interstate Commerce Commission. (49 U. S. C. §222(b).) The Congress has thus provided a federal judicial action to prevent disservice to a shipper but, consistent with the basic scheme of the statute, preserved to the Commission the exclusive right to decide in the first instance whether claimed disservice was in fact unjustly discriminatory.

Upon critical analysis it is apparent that none of the factors considered by this Court to be controlling in *Hewitt-Robins* are present here. Since the fact circumstances here and in *Hewitt-Robins* differ materially on those matters which bear on the question of the consistency of the action with the statutory purpose and since the Court of Appeals has given no clue to the basis of its decision the question which lies at the heart of the controversy still remains unanswered: All premises considered, is the survival of the particular common law cause of action here asserted consistent with the pattern and purpose of the Motor Carrier Act?

On the pertinent question there is a strong similarity between this case and that presented in *T.I.M.E.* The differences between the circumstances here and in *Hewitt-Robins* are more striking than the similarities. In any event, the comparisons with other cases are simply an aid to the proper solution of the question whether this action is consistent with the purposes of the Motor Carrier Act. Because this case is concerned with the important question of unjust discriminations in carrier service and because there are elements both of similarity and difference between the fact circumstances here and those present in *Hewitt-Robins* and *T.I.M.E.* it is inevitable the final decision in this case will have important impact upon the administration of the Motor Carrier Act in the critical area of the scope of judicial powers with respect thereto. Therefore, review by this Court of the unsupported conclusions of the Court of Appeals is required.

2. The Holding That the District Court Has Power to Modify and Adapt a Common Law Action to Conform to the Motor Carrier Act Is in Conflict With the Decisions of This Court in *T.I.M.E. Inc. v. United States* (359 U. S. 464) and *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* (371 U. S. 84).

In *T.I.M.E., Inc., supra,* and *Hewitt-Robins, Inc., supra,* this Court was called upon to decide whether the survival of a common law action would be consistent with the Motor Carrier Act within the meaning of Section 216(j) of said Act. The action in *Hewitt-Robins* survived because it was found consistent with the statutory purpose. In *T.I.M.E.* the action did not survive because continued existence would be inconsistent with the statutory scheme. However, in both cases the comparisons made for the purposes of testing consistency were between the statutory right and remedies, on the one hand, and the common law right and remedy *as it existed prior to the statutory enactment,* on the other hand.

Purportedly relying on *Hewitt-Robins* the Court of Appeals has now held the amended complaint states a common law cause of action which survives enactment of the Motor Carrier Act. However, the Court of Appeals also holds that the District Court can determine to what extent, if any, the common law right has been "affected or qualified or supplemented" by the Motor Carrier Act. (Appendix C, p. 11.) These holdings are contrary, in basic concept, to the decisions of this Court in both *Hewitt-Robins* and *T.I.M.E.*

If the Motor Carrier Act "affects" or "qualifies" or "supplements" the common law right involved, there is inconsistency *per se.* Furthermore, if the District

Court qualifies or supplements the common law right, then the right being enforced by judicial action is a statutory and not a common law right. By its expression of the idea that the judicial function includes the right to accommodate inconsistencies in the common law action with the statute the Court of Appeals has demonstrated a lack of appreciation of the issues involved. Therefore, review is necessary so the decision here will be consistent with the holdings in *Hewitt-Robins* and *T.I.M.E.*

B. The Holding of the Court of Appeals That the District Court Can Refer or Require Reference to the Interstate Commerce Commission for Such Aid as May Be Necessary or Useful to the Court's Ultimate Decision Is in Conflict With the Decisions of This Court and Results in Sanction of Departure From the Accepted and Usual Course of Judicial Proceedings Calling for the Exercise of the Supreme Court's Power of Supervision.

The Court of Appeals has held, *inter alia*, that ". . . if development of the facts should make it appropriate, the District Court can refer or require reference to the Interstate Commerce Commission. . . . for such aid as may be necessary or useful to that court's ultimate decision. . . ." (Appendix C, p. 11.) In support of such holding the Court of Appeals cited *Federal Maritime Board v. Isbrandsen Co.*, 356 U. S. 481, 498 (1958); *United States v. Western Pacific R. Co.*, 352 U. S. 59 (1959) and a footnote reference in *Hewitt-Robins*, 371 U. S. 184, 185).

The Interstate Commerce Commission is a statutory agency. It can thus provide only such aid to the courts

as the statute which creates it authorizes. Those statutory powers vary with the subject matter of its regulation. The principal issue in the present case potentially referable to the Commission is the central one as to whether or not the carriers' past actions constituted unjust and unreasonable discrimination under the conditions which prevailed. In Part I of the Act the Commission was specifically empowered to make postshipment determinations on issues of reasonableness and the discriminatory character of carrier conduct. (49 U. S. C. §9.) Such power has, however, been withheld from the Commission under both the Motor Carrier Act and the Freight Forwarder Act. In *T.I.M.E. Inc. v. United States* (359 U. S. 464, 475-479), it was held the Commission had no statutory power to make findings as to the reasonableness of past conduct of motor carriers. The past practice of the Commission of making such findings as an aid to the courts was specifically disapproved.

The *Isbrandsen* and *Western Pacific* cases relied upon by the Court of Appeals both antedate the decision of this Court in the *T.I.M.E.* case. In *T.I.M.E.* the *Western Pacific* case was distinguished on the basis that the reference there involved arose under Part I. *Isbrandsen Co.* involved a direct appeal from action of the Maritime Board under the Shipping Act. The case, therefore, cannot possibly be controlling in the issue here under consideration.

There are statements in *Hewitt-Robins* recognizing that the Commission has in some cases made findings with respect to past unreasonableness of motor carrier actions even though it lacks power to make reparations. The Commission decision cited as an example was

Bell Potato Chip Co. v. Aberdeen Truck Line, 43 M. C. C. 337. There is, however, also language immediately following these references indicating the Court did not consider it necessary for purposes of the decision to decide the legal propriety of such practice. (371 U. S. 184.) It would seem, therefore, that the holding in *T.I.M.E.*, including its express declaration that the Commission exceeded its statutory powers in *Bell Potato Chip Co. v. Aberdeen Truck Line,* must be accepted as the controlling precedent.

To Petitioners it would seem *T.I.M.E.* represents the direct holding of this Court on the question here considered and that the decision of the Court of Appeals is in direct conflict therewith. If, however, the language in the *Hewitt-Robins* case was intended as a modification or reversal of the holding in *T.I.M.E.* on the issue involved such intent certainly has not been clearly expressed. In either event a situation is here presented in which review by this Court of the holding of the Court of Appeals is required in advance of further proceedings, if any, in the District Court.

C. The Holding of the Court of Appeals That the Jurisdiction of the District Court Has Not Been Pre-Empted by That of the National Labor Relations Board Is in Conflict With Applicable Decisions of This Court.

At the time the District Court dismissed the action for lack of jurisdiction the record established that the failure of carrier service, if any, was caused entirely by a labor controversy and picket line at the shipper's place of business which carrier employees declined to cross for reasons related to their union membership.

[Tr. 78-87.] Thus the relationship between the carriers and their employees becomes the controlling circumstance on the issue of carrier liability.

In order to decide the merits of the case the District Court would be required to decide whether the carriers could lawfully force their driver employees to cross a picket line maintained by a local of their own union in connection with a strike at the shipper's premises and this in turn would require a determination as to whether the employees of the carriers had a right to refuse to cross the picket line. The carriers and their employees are covered by the Labor Relations Act.

Local Union No. 25 v. New York, N. H. & H. Ry. Co., 350 U. S. 155, 100 L. Ed. 166, 76 S. Ct. 227 (1956);

Garner v. Teamsters C & H Local Union No. 776, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953);

Amalgamated Ass'n etc. v. Wisconsin Employment Relations Board, 340 U. S. 383, 391-3, 95 L. Ed. 364, 71 S. Ct. 359 (1951).

Petitioners have urged at all stages in the action that, apart and aside from any questions raised under the Motor Carrier Act, the District Court is without jurisdiction in this case because the controversy necessarily raises issues the National Labor Relations Board (hereafter referred to as the NLRB) has exclusive jurisdiction to resolve in the first instance.

In its first decision on appeal the Court of Appeals expressly declined to pass on the issue (302 F. 2d 391). No reference was made to the question by this Court in its prior consideration of the case. 371 U. S. 184

(1962). On remand the Court of Appeals has held that jurisdiction of the District Court has not been pre-empted under Labor Management Relations Act, 1947, 29 U. S. C. §§141-187 (Appendix C, pp. 10-11.) This conclusion of the Court of Appeals is premised upon its conclusion that the decisions of this Court cited by Petioners are distinguishable.

The decisions of this Court upon which the Petitioners and other defendants placed primary reliance in support of the contentions as to jurisdiction in relation to the Labor Relations Act were:

General Drivers, etc. v. American Tobacco Co., 348 U. S. 978, 99 L. Ed. 762, 75 S. Ct. 659 (1959) (Reversing 264 S. W. 2d 250 (Ky.) (1953));

Teamsters v. Kerrigan Iron Works, 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1055 (1957);

McCrary et al. v. Aladdin Radio Industries, Inc., 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (1957) (Remanding 298 S. W. 2d 770 (Tenn.) (1956));

Bogle v. Jakes Foundry Co., 362 U. S. 401, 4 L. Ed. 2d 864, 80 S. Ct. 812 (1960) (Reversing 329 S. W. 2d 364 (Tenn.) (1959));

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L. Ed. 775, 79 S. Ct. 773 (1959);

Weber v. Anheuser Busch, 348 U. S. 468, 99 L. Ed. 2d 952, 79 S. Ct. 904 (1955);

Garner v. Teamsters C & H Local Union No. 776, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953).

Of the cases above cited only the first four listed were cited and discussed in the opinion of the Court of Appeals. It was held these four cases were distinguishable from the present case because (a) the action is one by a shipper against common carriers for breach of a claimed common law duty; (b) no union is a party; (c) no union intervened; (d) no unfair labor practice is alleged; (e) no injunction was issued or sought to control the conduct of any union or employer. Petitioners respectfully submit that these claimed grounds of distinction are neither factually accurate or legally significant.

In *General Drivers, supra,* a Teamster local had called a strike against a wholly owned subsidiary of the American Tobacco Company located on the parent company's land and surrounded by its facilities. Pickets were placed at all gates and employees of common carriers, members of the same union, refused to cross. Shipper brought action in the state court of Kentucky against the Teamsters resulting in an injunction requiring, among other things, that drivers of the common carriers cross the picket line. The Court of Appeals of Kentucky affirmed on the basis the issues turned on the common carrier duty and that employes so long as they voluntarily remained in the hire of their employers, did not have the lawful right to withhold their services from a particular customer who deals with their employers.

This Court reversed, *per curiam,* citing *Weber v. Anheuser Busch, Inc., supra,* and *Amalgamated Ass'n etc. v. Wisconsin Employment Relations Board, supra,* holding that the subject matter of the action lay within the exclusive jurisdiction of the NLRB.

If *General Drivers* could be distinguished because the action there was not brought against carriers, this is not true of *Kerrigan Iron Works, supra.* There a shipper who was struck by the Iron Workers and who had failed to receive service from common carriers because their driver employees had declined to cross the picket line (on all occasions peaceful) secured injunction against the carriers and the teamsters union. The union alone appealed. The appellate court of Tennessee affirmed the action of the trial upon the basis that the subject matter of the suit was the controversy between the shipper and the carriers and did not involve any employer-employee relation or any labor dispute. The only conduct involved was the refusal of the carriers and the employees to render the service.

This Court granted certiorari and reversed *per curiam* citing only *Weber and American Tobacco.* The case was one against carriers. No unfair labor practice was alleged.

McCrary v. Aladdin Radio Industries, supra had its origin in an action brought by a shipper solely against common carriers resulting in injunction compelling service by the carriers and their employees across a picket line at the shipper's place of business. Carrier employees appealed orders holding them in contempt for refusal to cross the picket line after the injunction had been issued. The Tennessee Court of Appeals affirmed on the basis that the activities of the drivers were not protected under the Labor Relations Act and that the issue was one which the state court could decide because of the nature of the action and of the duty involved. On certiorari this Court remanded citing its decision in *Kerrigan Iron Works.* Subsequent history

of the litigation establishes the remand went to the holding in the basic action.

Similarly in *Bogle v. Jakes Foundry Co., supra,* several carrier employees had appealed from judgments for contempt arising out of their refusal to cross a picket line at shipper's establishment after injunction had issued in a suit by the shipper naming only carriers as defendants. The Court of Appeals of Tennessee affirmed the contempt both on the ground that the injunction was properly issued and on the premise that, in any event, contempt would lie for disobedience of a void order. (329 S. W. 2d 364 (1959).) This Court granted *certiorari* solely with respect to the validity of the injunction and reversed *per curiam* citing *Kerrigan Iron Works* and *San Diego Building Trades Council v. Garmon, supra.*

From the foregoing comments it is apparent that the cases which the Court of Appeals sought to distinguish, considered together, did involve action by shipper against common carriers for breach of claimed common law duty; that in certain of the cases no union was a party, no union intervened and no unfair labor practice was alleged. Thus, the only fact element cited by the Court of Appeals common to each of the four cases but not here present was the injunctive aspect of the litigation. Citation by this court of the *Garmon* decision (which involved solely an award of damages) in the *Bogle* case requires the conclusion that jurisdiction of the court is precluded even though the shipper's action is solely for damages.

The error of the Court of Appeals lies in the fact that it has failed to recognize that jurisdictional problems arise because of the areas of conduct involved

and are not affected by the form of the action, the relief sought, or the identity of the litigants.

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959);

Association of Journeymen v. Borden, 373 U. S. 690, 10 L. Ed. 2d 638, ... S. Ct. .... (1963);

Weber v. Anheuser Busch, Inc., 348 U. S. 485, 98 L. Ed. 228, 7 S. Ct. 161 (1953).

This Court has held on numerous occasions that courts do not have jurisdiction to determine whether or not a particular activity is governed by Sections 7 or 8 of the Labor Relations Act. So long as the status of the conduct upon which the court would predicate a remedy is arguably within the compass of Sections 7 or 8 the jurisdiction of the court is displaced by that of the National Labor Relations Board.

San Diego Building Trades Council v. Garmon, supra;

Association of Journeymen v. Borden, supra.

On its holding on the jurisdictional question arising by reason of the Labor Relations Act the Court of Appeals has misconstrued and misapplied certain pertinent decisions of this Court. Other pertinent cases cited to the Court of Appeals were not considered by it. The conclusion of the Court of Appeals is contrary to the applicable decisions of this Court and must be reviewed.

D. Assuming Jurisdiction of the District Court Over the Action, the Holding That Said Court Can Refer or Require Reference for Aid to the NLRB Presents an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

Upon the premise that the District Court has jurisdiction of the action, the Court of Appeals holds reference may be made to the NLRB for its determination of fact issues necessary or useful to the ultimate decision of the action. Petitioners have been unable to find any decision of this Court in which the reference procedure declared proper by the Court of Appeals has been specifically considered. However, both the provisions of the Labor Relations Act and decisions of this Court would appear to require a determination that the procedure suggested by the Court of Appeals is without legal sanction.

Nowhere in the Labor Relations Act are there any provisions which could reasonably be construed as an express authorization for the type of inquiry and determination by the NLRB which the Court of Appeals envisions. Nor can such power reasonably be inferred from any expressed powers.

The only fact issues potentially subject to reference to the NLRB in connection with the present controversy would be those arguably within the compass of Sections 7 or 8 of the Labor Relations Act. The power of the NLRB with respect to these areas of regulation is delineated in section 10 (29 U. S. C. §160). The general power granted is the power ". . . to *prevent* any person from engaging in an unfair labor practice . . .". (29 U. S. C. §160(a); emphasis added.)

The statutory power to "prevent" is prospective in concept and cannot possibly be interpreted to include the declaratory type of determination related exclusively to past events which would be required "to aid" the court in reaching its ultimate decision. This conclusion is buttressed by the fact that the detailed procedural requirements imposed upon the NLRB in the implementation of its powers in matters relating to unfair labor practices are not adaptable to the type of inquiry here being considered. (29 U. S. C. §160(b)-(j).)

The question of the relationship between the courts and the NLRB as to matters arguably within the limits of Sections 7 and 8 of the Labor Relations Act has been before this Court in numerous cases.

See:

Amalgamated Ass'n etc. Div. No. 998 v. Wisconsin Employment Relations Board, 340 U. S. 383;

Garner v. Teamsters C. & H. Local Union, supra, 346 U. S. 458 (1953);

Weber v. Anhauser Busch, supra, 348 U. S. 468;

San Diego Building Trades Council v. Garmon, 359 U. S. 236;

Association of Journeymen v. Borden, 371 U. S. 690.

The *Garmon* case is particularly pertinent here. The action was for damages and the issue was the proper demarcation of the limits of authority between the court and the NLRB. In its opinion the Court undertook a restatement of its views on the basic questions presented. Nowhere was any consideration given to a compartmentation and division of fact-finding functions

as contemplated by the Court of Appeals in the present case. In *Garmon* and in all of the other cases cited, the premise has been that under the Labor Relations Act the issue presented is one of jurisdiction. When the authority of the NLRB is shown the court is ousted of jurisdiction with respect to the entire dispute.

Since the procedure for reference of fact issues to the NLRB contemplated by the Court of Appeals would be contrary to the statute and inconsistent with the decisions of this Court in *Garmon* and the other cases above cited an error exists which this Court should correct upon review.

E. The Issues Presented Are Such That Review Is Required Before Further Proceedings in the District Court.

The Court of Appeals has remanded the case to the District Court for further proceedings consistent with the views expressed in its opinion on remand (Appendix C, p. 12.) The nature of the issues decided by the Court of Appeals make review necessary before such remand.

The issue directly involved is the power of the Court to hear and determine the controversy. The jurisdictional issue has been properly raised and the facts essential to its determination are in the record in proper form.

Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209, 67 S. Ct. 1009 (1947);

KVOS v. Associated Press, 299 U. S. 269, 81 L. ed. 183, 57 S. Ct. 197 (1936).

Therefore, remand to the District Court would serve no useful purpose pertinent to the issue of jurisdiction. Obviously, jurisdictional questions must be resolved before further action of the District Court would be appropriate.

The Court of Appeals holds that upon further proceedings the District Court can refer or require reference to the Interstate Commerce Commission or the NLRB for such aid as may be necessary or useful to the court's ultimate decision. (Appendix C, p. 11.) The holding sanctions a course of conduct which represents a radical departure from the usual course of judicial proceedings. As Petitioners have shown more fully above, grave questions exist as to power of the District Court to order or authorize such procedures and of the administrative agencies to act upon any such request if received.

All considerations of validity aside, the fact remains that the Court of Appeals has directed the District Court into an area of joint judicial—administrative action which until now has not been explored. If they must proceed along this way the private litigants and the District Court should have advance guidance to assist them in charting a purposeful course. Thus, all other considerations aside, the writ should issue because the case, on the holdings of the Court of Appeals, is one which calls for an exercise of this Court's power of supervision.

Conclusion.

The decision of the Court of Appeals on remand is in conflict with decisions of this Court as to every holding involved. Important questions of interpretation of both the Motor Carrier Act and the Labor Relations Act are presented. For all of the reasons heretofore specifically stated the Writ requested should be issued.

Respectfully submitted,

CATLIN & CATLIN,
FRANK D. CATLIN,
GEORGE L. CATLIN,
Attorneys for Petitioners,
Universal Carloading & Distributing Co., Inc.,
Republic Carloading & Distributing Co., Inc.,
National Carloading Corporation,
Western Carloading Company,
Acme Fast Freight, Inc.

and

RUSSELL & SCHUREMAN,
THEODORE W. RUSSELL,
Attorneys for Petitioners,
Braswell Motor Freight Lines, Inc.,
Denver-Chicago Trucking Co., Inc.,
Hopper Truck Lines,
Illinois-California Express, Inc.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

302 F. 2d 391 (1962)

United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, et al., Appellees. No. 17,235.

Pensick & Gordon, Inc., a California corporation, Appellant, vs. California Motor Express, Limited, a corporation, et al., Appellees. No. 17,380.

April 13, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Pence, District Judge.

Pence, District Judge:

This is an action for money damages brought by shipper against several motor common carrier defendants. The shipper (Appellant), in its original complaint (App. No. 17235) alleged the breach by each of the common carriers (Appellees) of their statutory duty to serve the appellant under the Motor Carrier Act (hereinafter referred to as "MCA."), part II of the Interstate Commerce Act, Section 216 (b) and (d); (49 U.S.C.A., Sections 316 (b) and (d)).[1] The breach

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[1]Section 216 of the MCA (49 U.S.C.A. §316) reads, in pertinent part, as follows:

"(b). It shall be the duty of every common carrier of property by motor vehicle to provide . . . adequate service, to establish . . . just and reasonable . . . practices relating . . . to the manner and method of delivering property for transportation . . .", and "(d). It shall be unlawful for any common carrier by motor vehicle . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage."

alleged was failure of the appellees to pick up and make delivery of goods at appellant's place of business, upon reasonabe terms and without unjust discrimination.

In the original complaint, appellant asserted jurisdiction as to all appellees under 28 U.S.C.A. 1337, on the theory that the MCA gave a shipper the right under the Commerce clause to bring an action for damages in the United States District Court for breach by motor common carriers of their statutory duty to serve shippers and to serve without discrimination. The District Court, relying on Consolidated Freightways v. United Trucklines, (9 Cir., 1954), 216 F2d 543, decided that it did not have jurisdiction to hear and determine the controversy because the MCA does not provide any private remedy for a violation of any of its provisions, from which decision the appeal in No. 17235 was taken.

Appellant filed an amended complaint, again asserting jurisdiction lay in the District Court as to all appellees by virtue of the same 28 U.S.C.A. 1337, and also asserted jurisdiction on the premise that there exists a common law right of court action to enforce the common law duty of common carriers to serve without discrimination, apart from the statute, which common law rights survived the passage of the MCA, and that since diversity existed as to some of the appellees, jurisdiction lay in the District Court by virtue of 28 U.S.C.A. 1332.

Answers, as well as affidavits filed by all parties clearly showed that the failure to serve and the discrimination complained against resulted from the refusal of appellees' unionized drivers to cross a picket line thrown up around appellant's place of business by appellant's employees as a result of a strike at appel-

lant's plant. In determining the existence or nonexistence of the requisite jurisdictional facts, the District Court properly inquired into and weighed all answers and affidavits. *Williams v. Minnesota Mining and Manufacturing Company,* 14 FRD 1, 4-8, SDCal. 1953, and *Ramirez and Feraud Chili Company v. Las Palmas Food Company,* 146 F.Supp. 594, AFFD, 245 F2d 874 (9 Cir. 1957), Cert. Den. 355 US 927, 1958.

From a ruling by the District Court that still it was without jurisdiction to try appellant's amended complaint, a second appeal, No. 17380, was taken. Both appeals, No. 17235 and No. 17380, were joined for the purpose of argument and disposition.

Appellant's basic contentions are that it, as a shipper, has invoked the common law duty of a common carrier to serve; that the shipper's historic right of action for breach of that duty is in no way inconsistent with any power exclusively conferred upon the Interstate Commerce Commission under the MCA; and that the shipper's cause of action continues in dual form both as a common law right under the savings clause of the Act, 216 (j), (49 U.S.C.A. 316 (j)) as well as the statutory sanctions of Section 216 (b) and (d).

Since the facts as shown by the complaints, answers and affidavits clearly demonstrate that the alleged breach of duty of service arose out of the failure of the defendants to serve because of appellant's own labor dispute and appellees' employees' refusal to cross the appellant's union's picket line at appellant's plant, the alleged breach, by the very nature of those facts, depends upon the element of reasonableness or unreasonableness of the acts of appellees' employees in so refusing to cross the picket line. This, per se, demands the factual

determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination, as delineated in part II of the MCA, Sections 216 (b) and (d). The question of jurisdiction is thereby brought squarely within the purview of *T.I.M.E. v. United States,* 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904, and *Consolidated Freightways v. United Truck Lines, supra,* and the rationale of those cases is directly applicable here.

The legislative history of the MCA is fully covered in *T.I.M.E., supra,* and *Consolidated Freightways v. United Truck Lines,* 216 Ore. 515, 330 P. 2d 522, cert. den. 355 U. S. 1001. It is clear from that history that the MCA undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers. As heretofore indicated, Section 216 as it applies to the instant case, provides that carriers may not unreasonably refuse to serve or unjustly discriminate against any shipper. Therefore, in every case in which the problem of carrier compliance with the service or discrimination clauses of Section 216 of the MCA is raised, there must be a determination by the Commission of whether there has been a disservice or discrimination with respect to treatment of shippers, and whether such treatment was unreasonable or unjustly discriminatory. "Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." *Carpenters' Union v. Labor Board,* 357 U. S. 93, 110, and only the Commission can answer that question.

Under the statutory scheme of the MCA, only the ICC can decide in the first instance whether any alleged act of disservice on the part of the appellees was unreasonable or unjustly discriminatory and the courts are without authority to make such a determination. If, under the saving clause, §216 (j) of the MCA, no common law remedy is saved to a shipper, aggrieved by an unreasonable rate, which was held in T.I.M.E. to be an administrative question, no such remedy is saved to a shipper aggrieved by unreasonable disservice or unjust discrimination, which also is an administrative question, as held in *Carpenters' Union v. Labor Board, supra.* Whenever, under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice, or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the courts.

It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the MCA, but where, as appellant recognized here,[2]

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[2]"The gist of the action is the failure of the Defendants individually, at specified times, to provide service to the Plaintiff upon reasonable terms and without discrimination."
App. No. 17235, Apnt. Op. Br., p. 1.
"This cause is the companion to that in Ap. No. 17235 . . . The theories of the first and second causes are identical."
Ap. No. 17380, Apnt. Op. Br., p. 1, 2.
"Sec. 216(b) and (d) of the Motor Carrier Act . . . contains . . . a statutory embodiment of this . . . (common law duty of a common carrier to serve).
"The commission has further refined the general standards laid down by the statute . . .
"The foregoing are the standards by which the conduct of the Appellees must be measured, and this Appellant does not question the standards; it seeks only to establish a failure to conform to them . . ."
Aps. No. 17235, No. 17380, Apnt. Reply Br., p. 3.

the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it.

Having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of appellees' affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board.

As to each appeal, we hold the District Court correctly dismissed each complaint for lack of jurisdiction.

Affirmed.

(Endorsed) Opinion Filed April 13, 1962.

Frank H. Schmid, Clerk.

APPENDIX B.

371 U. S. 184, 9 L. ed. (2d) 227, 83 S. Ct. 265 (1962)

No. 222. Pensick & Gordon, Inc., Petitioner, v. California Motor Express et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

December 3, 1962. Per Curiam: The Petition for Writ of Certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., No. 37, October Term, 1962, decided November 19, 1962.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White would affirm the judgment below for the reasons given in the dissenting opinion in No. 37.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, et al., Appellees. Nos. 17,235 and 17,380 Sept. 18, 1963.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges and Weigel, District Judge.

Weigel, District Judge.

When these cases were considered by us last year,[1] we held that the District Court was without jurisdiction to determine whether or not appellee motor carriers failed to provide service as required by Section 216 of the Motor Carrier Act (49 U.S.C.A. §316). We affirmed dismissal of a complaint grounded in claims of violation of that statute because of our view that the statute itself vested such jurisdiction exclusively in the Interstate Commerce Commission. We held, further, that the effort of appellant, in an amended complaint, to assert a common law right of action for failure to provide service raised identical issues and was, therefore, also rightly dismissed by the District Court upon the same grounds.

The Supreme Court has now remanded to us "for further consideration in light of *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, [371 U.S. 84 (1962)]". 371 U.S. 184 (1962).

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[1] 302 F.2d 391 (1962).

In the light of *Hewitt-Robins*, we now hold that the amended complaint states a common law cause of action which survived enactment of the Motor Carrier Act. What effect that statute or any other federal statute may have upon the surviving common law cause of action will have to be determined by the District Court in further proceedings.

We do not read *Hewitt-Robins* as holding that the Motor Carrier Act created a statutory cause of action cognizable in the federal courts in the first instance. *Hewitt-Robins* considered only the survival of the common law right there involved. It did not change the holdings in *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959) nor *Consolidated Freightways v. United Truck Lines*, 216 F.2d 543 (9th Cir., 1954) upon which we relied in deciding that the first complaint, grounded in claimed violations of statutory right, was properly dismissed for lack of jurisdiction.

Therefore, the further proceedings below, grounded solely in common law rights, will be limited to the plaintiff and to those defendants as to whom diversity exists.

The starting point for further proceedings on the cause of action sounding in common law will rest, of course, upon the long recognized doctrine that a cause of action does exist against a common carrier for unjustified failure or refusal to transport freight. The California cases include: *Samuelson v. Public Utilities Commission*, 36 C.2d 722, 227 P.2d 256 (1951); *Chase v. South Pacific Coast R. Co.*, 83 Cal. 468, 23 Pac. 532 (1890); *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616 (1868) (passenger); *American Fruit Distributors v. Hines*, 55 C.A. 377, 203 Pac. 921 (1921). The

cases in other jurisdictions include: *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612 (1909); *York Co. v. Central R.*, 70 U.S. (3 Wall.) 107 (1865); *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 How.) 343 (1848); *Swayne & Hoyt, Inc. v. Everett*, 255 Fed. 71 (9th Cir., 1919); *Moor v. Texas & N. O. R. Co.*, 75 F.2d 386 (5th Cir., 1935); *Merchandise Warehouse Co. v. A.B.C. Freight For. Corp.*, 165 F.Supp. 67 (S.D. Ind., 1958); *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F.Supp. 475 (D. Ore., 1953); *Louisville & N.R. Co. v. Falls City etc. Co.*, 61 S.W.2d 639 (Ct. Ap. Ky., 1933); *Nelson v. Atlantic Coast Line R. Co.*, 82 S.E. 868 (S.Ct. N.C., 1914); *Pittsburgh etc. R. Co. v. Racer*, 31 N.E. 853 (Ap. Ct. Ind., 1892); *Avinger v. South Carolina R. Co.*, 7 S.E. 493 (S.Ct. S.C., 1888); *Central & M.R. Co. v. Morris*, 3 S.W. 457 (S.Ct. Tex., 1887).

Appellees again strongly urge upon us that the jurisdiction of the District Court was pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act, 29 U.S.C.A. §§141 et seq. In support of this position, they rely upon these cases: *General Drivers Union v. American Tobacco Co.*, 264 S.W.2d 250 (Ct. Ap. Ky., 1953, modified on rehearing 1954), reversed, 348 U.S. 978 (1955); *Kerrigan Iron Works v. Cook Truck Lines*, 296 S.W.2d 379 (Ct. Ap. Tenn., 1956), reversed sub nom. *Teamsters Local No. 327 v. Kerrigan Iron Works*, 353 U.S. 968 (1957); *Aladdin Industries v. Associated Transport*, 298 S.W. 2d 770 (Ct. Ap. Tenn., 1956), vacated and remanded sub nom. *McCrary v. Aladdin Radio Industries*, 355 U.S. 8. (1957), see 323 S.W.2d 222 (Ct. Ap. Tenn., 1958) on remand; *Jakes Foundry Co. v. Tennessee-*

Carolina Trans. Co., 329 S.W.2d 364 (Ct. Ap. Tenn., 1959), reversed sub nom. *Bogle v. Jakes Foundry Co.*, 362 U.S. 401 (1960). The cited cases are not controlling here. This is an action by a shipper against various common carriers for damages resulting from claimed breach of a common law duty. No union is a party. No union intervened. No unfair labor practice is alleged. No injunction was issued or sought to control the conduct of any union or employer. The absence of any such facts here sufficiently distinguishes the cases relied upon by appellees.

In further proceedings, the District Court can determine to what extent, if any, the common law right has been affected or qualified or supplemented by the Motor Carrier Act, *supra*, or the Labor Management Relations Act, *supra*.—either, neither or both. Moreover, if development of the facts should make it appropriate, the District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to that court's ultimate decision. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958); *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). See also *Hewitt-Robins, supra*, p. 85, footnote.

The evidence adduced before the District Court may well disclose a situation where the common law rights of the parties must be balanced in the light of pertinent federal statutes. Indeed, a balance may have to be stricken in measuring the conflicting impacts of apparently conflicting federal statutes upon those common law rights. Resolution may not be easy, but it can

best be accomplished after a full airing and consideration of all the facts.

The matter is now accordingly remanded to the District Court for further proceedings consistent with the views expressed above.

(Endorsed). Opinion Filed September 18, 1963.

Frank H. Schmid, Clerk.

APPENDIX D.

Interstate Commerce Act.

Part II

Rates, Facilities for Carriers of Property

Sec. 216(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Undue Preferences or Prejudices Prohibited

Sec. 216(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any

unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Effect on Remedy or Right of Action

Sec. 216(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

INTERSTATE COMMERCE ACT

Part IV

Sec. 404(a) It shall be the duty of every freight forwarder to provide and furnish, upon reasonable request therefore, the service subject to this chapter covered by its permit issued under this chapter, and to establish, observe, and enforce just and reasonable rates and charges therefor and just and reasonable classifications, regulations, and practices relating thereto and to the issuance, form, and substance of receipts and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation in service subject to this chapter, the facilities for such transportation, and all other matters relating to or connected with such transportation, and every unjust or unreasonable rate, charge, classification, regulation, or practice is prohibited and declared unlawful.

Sec. 404(b) It shall be unlawful for any freight forwarder, in service subject to this part, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, terri-

tory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any carrier of whatever description.

LABOR MANAGEMENT RELATIONS ACT
(49 U.S.C. §§ 157, 158)

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute

financial or other support to it; *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee

for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an

order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of

the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions

of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SUBJECT INDEX

	Page
Introduction	1
Opinion of the Supreme Court and of the courts below	2
Statutes involved	2
Statement of the case	3
Questions presented	3
Argument	6
A. The holding of the court of appeals that the respondent's common law cause of action survived the enactment of the Motor Carrier Act is in perfect consonance with the applicable decisions of this court	6
B. The holding of the court of appeals on remand that the jurisdiction of the district court has not been pre-empted by that of the National Labor Relations Board is perfectly consonant with applicable decisions of this Court	8
C. The holding of the court of appeals that the district court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board or both for such aid as may be necessary or useful to the court's ultimate decision presents important questions of law which should be settled by this court	10
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases	Page
Bogle v. Jakes Foundry Co., 362 U. S. 401, 4 L. Ed. 2d 864, 80 S. Ct. 812, revg. 329 S. W. 2d 364	9
Garner v. Teamsters C & H Local Union No. 77, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161	9
General Drivers, etc. v. American Tobacco Co., 348 U. S. 978, 99 L. Ed. 762, 75 S. Ct. 659, rev. 264 S. W. 2d 250	9
Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U. S. 84, 9 L. Ed. 2d 142, 83 S. Ct. 157	7, 8
McCrary et al. v. Aladdin Radio Industries, Inc., 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12, remand. 298 S. W. 2d 770	9
Pensick & Gordon, Inc. v. California Motor Express, et al., 302 F. 2d 391	7
San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L. Ed. 775, 79 S. Ct. 773	9
Smith v. The Evening News Association, 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267	10
T.I.M.E. Inc. v. United States, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904	6, 7, 9
Teamsters v. Kerrigan Iron Works, 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1055	9
Weber v. Anheuser Busch, 348 U. S. 468, 99 L. Ed. 2d 952, 79 S. Ct. 904	9

Statutes	Page
Labor Management Relations Act, Sec. 303	10
Labor Management Relations Act of 1947, as amended by Public Law 86-257, 1959	10
Motor Carrier Act, Sec. 216(b)	3
Motor Carrier Act, Sec. 216(d)	3
United States Code, Title 29, Sec. 187	10
United States Code Annotated, Title 28, Sec. 1331	4
United States Code Annotated, Title 29, Sec. 141	5

IN THE

Supreme Court of the United States

October Term, 1963

No. 625

Case No. 17380

BRASWELL MOTOR FREIGHT LINES INC., DENVER-CHICAGO TRUCKING CO., INC., HOPPER TRUCK LINES, ILLINOIS-CALIFORNIA EXPRESS, INC., UNIVERSAL CARLOADING & DISTRIBUTING CO., INC., REPUBLIC CARLOADING & DISTRIBUTING CO., INC., NATIONAL CARLOADING CORPORATION, WESTERN CARLOADING CO., and ACME FAST FREIGHT, INC., corporations,

Petitioners,

vs.

PENSICK & GORDON, INC., a California corporation,

Respondent.

Brief of Respondent Pensick & Gordon, Inc., a California Corporation, in Reply to Petition for Certiorari.

Introduction.

This Respondent has petitioned separately (No. 645, October Term, 1963) in this cause, No. 17380, as well as in its consolidated companion cause, No. 17235, for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's decision in these causes on remand.

Respondent, therefore, concurs in the view that a review of these causes and the opinion on remand by this Court is necessary before further proceedings therein can be had, but for the reasons, and as to the questions, set forth in its own Petition.

Certain questions specified by Petitioners herein are similar or related to certain of those raised by Respondent in its own Petition; others raised herein, however, find no echo in Respondent's Petition. It is the purpose of this Brief to state Respondent's position as to which of these questions do and do not properly require review by this Court.

The subject matter of these causes is one of major concern to the nation's transportation industry, and all parties seem agreed that authoritative resolution at the highest level is vitally necessary; the only area of disagreement in this respect appears to lie in the direction of which questions have been authoritatively settled and which still require determination.

Opinion of the Supreme Court and of the Courts Below.

The Petition correctly summarizes and appends these.

Statutes Involved.

Respondent concurs in Petitioners' statement regarding the pertinence of the cited Sections of the Interstate Commerce Act, Parts II and IV. Respondent disputes, however, the pertinency to the causes of any portion of the Labor Management Relations Act.

Statement of the Case.

Respondent concurs in Petitioners' statement of the case and in its summary of the holding of the Court of Appeals on remand, with the following exception:

Petitioners characterize the action as one charging "unjust and unreasonable discrimination in service giving rise to an action for damages . . ." The gist of the action was the failure of the Defendant carriers and forwarders to provide service to the Plaintiff-Respondent in violation of their obligation to do so, both under statutory and common law sanctions. To the extent that other shippers at the time were treated differently, this may have amounted to a discrimination. However, the damage arose from the failure to provide service to this Respondent-Plaintiff, and it is this refusal and failure which is the gist and basis of the action.

Questions Presented.

In Respondent's view, the questions specifically presented by the within causes and which do necessitate review and resolution by this Court are those set forth by it in its Petition, to wit:

(1) Does a private shipper have the right to seek and obtain redress from motor common carriers for loss or damage suffered as a consequence of the carriers' breach of the duty to render service under the statutory sanctions of the Motor Carrier Act, Sections 216(b) and (d)?

(2) Assuming the existence of such a shipper's right of action, do the Federal Courts have jurisdiction thereof as an action arising under an Act of Congress regulating commerce?

(3) Conversely stated, the foregoing questions may be summarized as follows: Did Congress intend by the Motor Carrier Act that no rights should flow to shippers from the statutory duty to render service imposed by it upon motor common carriers and, at the same time, intend that shippers should continue to enjoy the rights flowing from the common law counterpart of that same duty?

(4) In view of the important Federal policy and statutory considerations attaching to and arising from such common law damage actions, as indicated in the court's opinion on remand, do not the Federal Courts have jurisdiction thereof under 28 U. S. C. A., Sec. 1331, independent of the existence of diversity of citizenship?

(5) If the Federal Courts' jurisdiction to hear and determine such a cause is not barred or preempted because of the fact that the breach of duty was occasioned in part by the existence of a peaceful picket line at the shipper's place of business, is such jurisdiction or the cause of action otherwise affected or modified as a consequence of this fact?

Respondent's position with respect to the questions specified by Petitioners as being presented may be summarized as follows:

Petitioners' Questions 1 and 2[1] have been properly resolved by the Court of Appeals in accord-

[1] 1. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of common carriers by motor vehicle in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes

ance with appropriate expressions of this Court. There exists, therefore, no conflict with decisions in other Circuits nor with applicable decisions of this Court and, consequently, no need for further determination.

Petitioners' Question 4[2], although a question of major national impact, has likewise been decided by the Court of Appeals, correctly, we submit, and in consonance with applicable principles and decisions of this Court, even though this Court has not decided, with opinion, a case directly on the point.

Petitioners' Questions 3 and 5[3] are indeed tendered by the decision of the Court of Appeals and do necessarily require resolution and determination by this Court before further proceedings can

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unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part II?

2. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of freight forwarders in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part IV?

[2] 4. Is jurisdiction of the District Court in the particular controversy pre-empted by that of the National Labor Relation Board, under the Labor Management Relations Act, 29 U. S. C. A., §§141 *et seq*?

[3] 3. Assuming jurisdiction of the District Court over the action, may the District Court seek and the Interstate Commerce Commission give an advisory opinion as to whether the carrier's conduct in failing to provide pickup and delivery service across picket lines constitutes an unjust and unreasonable discrimination in service?

5. Assuming jurisdiction of the United States District Court is not so pre-empted, may the District Court seek and the National Labor Relations Board give an advisory opinion as to whether any activity of any person pertinent to the determination of the action is protected or prohibited by the National Labor Relations Act, as amended?

be had for the reasons expressed not only in this Petition but also in Respondent's Petition. In this latter connection, Respondent views these questions as embraced within the ambit of its own Question 5, above.

ARGUMENT.

A. The Holding of the Court of Appeals That the Respondent's Common Law Cause of Action Survived the Enactment of the Motor Carrier Act Is in Perfect Consonance With the Applicable Decisions of This Court.

This action is based, in part, upon the shipper's historic right of action at common law to recover damages against common carriers who fail or refuse to provide him service, reasonably requested, in violation of their duty to do so. From the outset, Petitioners have argued that this Court's decision in *T.I.M.E. Inc. v. United States* (1959), 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (herein simply referred to as *T.I.M.E., Inc.*), applied to and governed these causes and necessitated, therefore, a holding that the common law cause of action did not survive the enactment of the Motor Carrier Act (Interstate Commerce Act, Part II) and, by implication, the pertinent portions of the Freight Forwarder Act (Interstate Commerce Act, Part IV).

Respondent has, with equal vigor, consistently argued that the rule of *T.I.M.E., Inc.* was inapposite to these causes.

In its original opinion herein, the Court of Appeals agreed that *T.I.M.E., Inc.* was controlling and that the common law cause of action had been extinguished.

Pensick & Gordon, Inc. v. California Motor Express, et al. (9 Cir. 1962); 302 F. 2d 391.

In its earlier Petition, Respondent urged its original position upon this Court and cited the case of *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* then pending before it and later the subject of this Court's opinion reported at 371 U. S. 84, 9 L. Ed. 2d 142, 83 S. Ct. 157 (1962) (herein referred to simply as *Hewitt-Robins, Inc.*).

In its earlier decision herein, this Court granted this Respondent's Petition for Certiorari and remanded to the Court of Appeals for further consideration in the light of that same decision, *Hewitt-Robins, Inc. (Pensick & Gordon, Inc. v. California Motor Express, et al.* (1962), 371 U. S. 184, 9 L. Ed. 2d 227, 83 S. Ct. 265).

This Court could give no clearer indication, we submit, of its view that Respondent was correct in the contention which it originally put forth and that the position of these Petitioners as well as the Court of Appeals in its original holding were incorrect and inappropriate. Had this Court thought otherwise, there would have been no occasion to disturb the Court of Appeals' original holding.

Manifestly, then, this Court's earlier decision in these causes sustains Respondent's contention that the common law cause of action for damages *did* survive enactment of the Motor Carrier Act at the same time that it rules out Respondent's contention that *T.I.M.E., Inc.* is controlling. The Court of Appeals, in its opinion on remand, recognized this and held accordingly.

The decision of the Court of Appeals, on remand, is thus in conflict with no decision of this Court, but is,

quite the contrary, in perfect consonance with the one most clearly applicable decision, to wit, *Hewitt-Robins, Inc.*

Since there exists no conflict between the Court of Appeals' decision on this point and the applicable decision of this Court, there is, we submit, no occasion for this Court to reconsider the survival of the common law action (Petitioners' Questions 1 and 2) merely to confirm the Court of Appeals' holding thereon and reconfirm its own views earlier expressed.

While there are several questions presented by the decision on remand and compelling reasons for their review by this Court, Petitioners' Questions 1 and 2 are not among them.

B. The Holding of the Court of Appeals on Remand That the Jurisdiction of the District Court Has Not Been Pre-Empted by That of the National Labor Relations Board Is Perfectly Consonant With Applicable Decisions of This Court.

The pleadings before the District Court in these causes disclosed that the refusal to provide service, of which Plaintiff complained was occasioned, at least in part, by the existence at Plaintiff's place of business of a peaceful picket line and by the consequent refusal of Defendants' drivers to cross this line to render pick up and delivery service. Petitioners have urged throughout that this mere fact operated to oust the District Court of any jurisdiction which it might otherwise have on the theory that the controversy "necessarily raises issues the National Labor Relations Board [hereinafter referred to simply as Board] . . . has exclusive jurisdiction to resolve in the first instance."

Petition, p. 18. In support of this proposition, certain decisions of this Court, many of them *per curiam*, have been cited by Petitioners

General Drivers, etc. v. American Tobacco Co., 348 U. S. 978, 99 L. Ed. 702, 75 S. Ct. 659 (1959) (Reversing 264 S. W. 2d 250 (Ky.) (1953));

Teamsters v. Kerrigan Iron Works, 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1055 (1957);

McCrary et al. v. Aladdin Radio Industries, Inc., 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (1957) (Remanding 298 S. W. 2d 770 (Tenn.) (1956));

Bogle v. Jakes Foundry Co., 362 U. S. 401, 4 L. Ed. 2d 864, 80 S. Ct. 812 (1960) (Reversing 329 S. W. 2d 364 (Tenn.) (1959));

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L. Ed. 775, 79 S. Ct. 773 (1959);

Weber v. Anheuser Busch, 348 U. S. 468, 99 L. Ed. 2d 952, 79 S. Ct. 904 (1955);

Garner v. Teamsters C. & H. Local Union No. 77, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 (1953).

As with *T.I.M.E., Inc.* these cases are inapposite, and the Court of Appeals so held, giving the following reasons: This is an action by a shipper against carrier entities for damages; no union is a party; no union has intervened; no unfair labor practice is alleged; no injunction was issued or was sought to control the conduct of any union or employer.

On the other hand, the jurisdiction of the District Court to hear and determine an action for damages, even one directly involving unfair labor practices, is the subject of specific statutory sanction. Labor Management Relations Act; Section 303 (Labor Management Relations Act of 1947, as amended by Public Law 86-257, 1959; 29 U. S. C. Sec. 187). Further, Court jurisdiction in the premises has recently received specific reconfirmation by this Court. *Smith v. The Evening News Association* (1962), 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267.

Thus, while this Court has not expressed itself in any opinion deciding a case squarely on the point, which is one of national impact and importance, the decision of the Court of Appeals on remand is, nevertheless, in perfect consonance with the policy of the statute as interpreted and expounded in those decisions of this Court most nearly analogous. Accordingly, there exists no occasion for the granting of *certiorari* as to this particular question.

C. The Holding of the Court of Appeals That the District Court Can Refer or Require Reference to the Interstate Commerce Commission or the National Labor Relations Board or Both for Such Aid as May Be Necessary or Useful to the Court's Ultimate Decision Presents Important Questions of Law Which Should Be Settled by This Court.

Respondent concurs with the view of Petitioners that the Court of Appeals' holding that the District Court, in further proceedings below, can refer or require reference to the Interstate Commerce Commission or the Board for such aid as may be necessary or useful to the

Court's ultimate decision is one which presents questions of first instance and of the utmost importance and which should be reviewed and determined by this Court, both for the reasons set forth in this Petition and in the Petition heretofore filed by this Respondent in the consolidated causes.

Conclusion.

For the reasons set forth above, as well as for the reasons set forth in its own separate Petition, Respondent believes it imperative that this Court grant a Writ of Certiorari in these causes. However, for the reasons above expressed, Respondent urges that Petitioners' questions pertaining to the existence or survival of the common law remedy and to the preemption of jurisdiction by the Board should be excluded from the scope of determination prescribed by the Writ.

Respectfully submitted.

HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Petitioner.